IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 77-234

RICHARD E. SPENCER, APPELLANT,

vs.

LORRAINE B. SPENCER, ET. AL., APPELLEES

Appeal from the United States District Court
for the Middle District of North Carolina

STATEMENT AS TO JURISDICTION

Janet L. Covey
Counsel for Appellant
Sherwood House Law Building
426 West Friendly Avenue
Greensboro, North Carolina 27401
(919) 273-8276

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

RICHARD E. SPENCER, APPELLANT,

vs.

LORRAINE B. SPENCER, ET. AL., APPELLEES

Appeal from the United States District Court
for the Middle District of North Carolina

STATEMENT AS TO JURISDICTION

Janet L. Covey
Counsel for Appellant
Sherwood House Law Building
426 West Friendly Avenue
Greensboro, North Carolina 27401
(919) 273-8276

INDEX

TABLE OF AUTHORITIES

Statutes:

28 U.S.C. §§ 2282 and 2284.

N.C. Gen. Stat. § 52-12 (1957), recodified in 1965 as § 52-6 (1976).

Cases:

Bolin v. Bolin, 246 N.C. 666, 99 S.E.2d 920 (1957).

Butler v. Butler, 169 N.C. 584, 86 S.E. 807 (1915).

Caldwell v. Blount, 193 N.C. 560, 137 S.E. 578 (1927).

Cleveland Board of Education v. Lafleur, 414 U.S. 632 (1974).

Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967).

England v. Louisianna State Board of Medical Examiners, 375 U.S. 411 (1964).

Frontiero v. Richardson, 411 U.S. 677 (1973).

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

Juidice v. Vail, 45 U.S.L.W. 4269 (U.S. March 22, 1977).

Kanoy v. Kanoy, 17 N.C. App. 344, 194 S.E.2d 201 (1973).

Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923).

Reed v. Reed, 404 U.S. 71 (1971).

Stanton v. Stanton, 421 U.S. 7 (1975).

Sterling v. Constantin, 287 U.S. 378 (1932).

Trainor v. Hernandez, 45 U.S.L.W. 4535 (U.S. May 31, 1977).

Weber v. Aetna Casualty & Surety Co., 406 U.S. 636 (1975).

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

U.S. v. Georgia Public Service Commission, 371 U.S. 285 (1963).

Younger v. Harris, 401 U.S. 37 (1971).

Zwickler v. Koota, 389 U.S. 241 (1967).

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

RICHARD E. SPENCER, APPELLANT,

vs.

LORRAINE B. SPENCER, ET. AL., APPELLEES

_____

Appeal from the United States District Court for the Middle District of North Carolina

STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment dismissing the action and should exercise such jurisdiction in this case.

OPINION BELOW

The District Court delivered a written opinion which was filed on April 29, 1977. Pursuant to this opinion, a final judgment was entered on May 19, 1977. Copies of the opinion and the judgment are attached to this jurisdictional statement.

JURISDICTION

The appeal herein is from a final decree made and entered by a United States District Court for the Middle District of North Carolina specially constituted under 28 U.S.C. §§ 2282 and 2284 upon the plaintiff's application for a declaratory judgment and a permanent injunction to restrain and permanently enjoin enforcement of N.C. Gen. Stat. § 52-12 (recodified in 1965 as § 52-6), for repugnance to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The final decree appealed from was made and entered on May 19, 1977. Notice of appeal was filed in the United States District Court for the Middle District of North Carolina on June 15, 1977.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U.S.C. §§ 1253 and 2101(a).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. Zwickler v. Koota, 389 U.S. 241 (1967); Sterling v. Constantin, 287 U.S. 378, 393, 394 (1932); Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923); England v. Louisianna State Board of Medical Examiners, 375 U.S. 411 (1964); U.S. v. Georgia Public Service Commission, 371 U.S. 285, 288 (1963).

The statute in controversy here is N.C. Gen. Stat. § 52-12 (recodified in 1965 as § 52-6.). That statute provides, in pertinent part, as follows:

(a) No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, nor shall any separation agreement between husband and wife be valid for any purpose unless such contract or separation agreement is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land.

(b) The certifying officer examining the wife shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife. The certificate of the officer shall be conclusive of the facts therein stated but may be impeached for fraud as other judgments may be.

The District Court held that the pendency of an action in state court involving the same parties and issues precluded the Court from exercising its jurisdiction to determine the constitutionality of the statute.

QUESTIONS PRESENTED

N.C. Gen. Stat. § 52-12 (now § 52-6) provides that no separation agreement or contract between husband and wife shall be valid unless the contract "is acknowledged before a certifying officer who shall make a private examination of the wife" and who shall certify that the contract is not "unreasonable or injurious to the wife." Appellant Richard E. Spencer filed this action, contending that he was denied the equal protection of the laws inasmuch as he was, as a male person, denied the protection of a private examination. The day following the commencement of this action, appellee Lorraine Spencer filed an action upon the contract in the North Carolina state courts. The District Court held that this state action precluded the exercise of federal jurisdiction. The principal questions presented on this appeal are:

(1) Whether abstention is appropriate in purely civil cases unless the State interests involved are sufficiently important to preclude federal injunctive relief.

(2) Whether abstention is appropriate in a case involving a statute which is "flagrantly and patently violative of express constitutional prohibitions."

STATEMENT OF THE CASE

Appellant Richard E. Spencer is an adult male who was formerly married to the appellee Lorraine Spencer.

On June 7, 1960, Richard E. Spencer and Lorraine Spencer entered into a separation agreement which was executed in compliance with the provisions of N.C. Gen. Stat. § 52-12 (now § 52-6).

In accordance with the provisions of that statute, Lorraine Spencer was given a private examination at the time the separation agreement was executed. An Assistant Clerk of the Superior Court of Guilford County, North Carolina, privately examined the wife, Lorraine Spencer, concerning the execution of the separation agreement. The Assistant Clerk certified that the wife stated that she signed the agreement freely and voluntarily, without fear or compulsion of her husband or any other person. The Clerk then certified that the agreement was not unreasonable or injurious to her.

No private examination was given to the husband, Richard E. Spencer, in connection with the execution of the separation agreement, and there was no certification by any officer of the court that such agreement was not unreasonable or injurious to him. The statute did not make provision for such an examination of the husband, nor were there any other statutory provisions requiring or permitting a private examination for male persons.

The appellee Lorraine Spencer has on occasions threatened action in the state courts of North Carolina for enforcement of the provisions of the separation agreement executed without a private examination for the husband.

Furthermore, the predecessors of the appellee Judges have, acting under color of state law, enforced the separation agreement against the appellant.

Appellant Richard E. Spencer instituted this action for injunctive and declaratory relief from the enforcement of N.C. Gen. Stat. § 52-12 (now § 52-6). He asked that the Court declare the rights of the parties to the separation agreement and that the court restrain the enforcement of the separation agreement against him.

The day following the institution of this action, on April 6, 1977, appellee Lorraine Spencer filed an action against appellant Richard E. Spencer in the District Court Division of the General Court of Justice for Guilford County, North Carolina. In that action, Lorraine Spencer sought to recover payments allegedly due under the separation agreement. The allegations of the complaint in the state court action were identical to the allegations of the counterclaim filed by Lorraine Spencer in the case at bar. Richard E. Spencer filed answer in the state court action, but reserved his rights pursuant to the decision in England v. Louisianna State Board of Medical Examiners, 375 U.S. 411 (1964). The allegations contained in the answer in state court were virtually identical to the allegations of the complaint in the case at bar.

This cause was originally set for oral argument before the three-judge court on January 31, 1977. Both plaintiff and defendants filed briefs upon

the merits of the case. Fourteen days prior to the time of the original hearing date, the appellee Lorraine Spencer filed a motion to dismiss or stay this action upon the grounds announced in Younger v. Harris, 401 U.S. 37 (1971).

The District Court held that the principles of comity and federalism precluded the exercise of jurisdiction. Accordingly, the action was dismissed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

A. Abstention is inappropriate in purely civil cases unless the State interests involved are sufficiently important to preclude federal injunctive relief.

This action was instituted in the federal courts for protection of rights guaranteed by the Fourteenth Amendment. The Federal District Court held, however, that a subsequent state court action involving the same issued precluded the exercise of federal jurisdiction. In dismissing the action, the District Court relied upon the doctrine of Younger v. Harris, 401 U.S. 37 (1971). The Court stated that this doctrine now applies equally to "both civil and criminal actions." In support of this conclusion, the three-judge court cited the cases of Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Juidice v. Vail, 45 U.S.L.W. 4269 (U.S. March 22, 1977).

It is true that considerations of comity and federalism, which underlie the Younger doctrine, may require

abstention in a civil case. Trainor v. Hernandez, 45 U.S.L.W. 4535, 4537 (U.S. May 31, 1977). It is questionable, however, whether these considerations may be said to apply equally to civil and criminal actions. In Trainor, supra., the Court explained that the determinative question is whether a "sufficiently important" State interest is involved. 45 U.S. L.W. at 4537.

In Huffman v. Pursue, Ltd., supra., the State's interest was sufficiently important because the action was closely akin to a criminal proceeding. The Court in that case made special note that the State was a party to the action pending in state court and that the proceeding was both in aid of and closely related to the criminal statutes. Thus, the federal action created a possibility of interference with the State's primary interest in regulating the criminal conduct of its citizens.

Important State interests such as these are not present in the case at bar. Here, the State is not a party to the action in state court. Although certain state officers were named as defendants in this action, they are merely nominal parties. The state officials named as defendants here were merely named for certain acts which they perform under the statutory framework.

The real controversy here is between appellant Richard Spencer and his former wife, appellee Lorraine Spencer. The State's interest in the outcome is neither direct nor substantial.

In addition, the case at bar differs from Huffman, supra., in that the proceedings here is neither "in aid of nor closely related to the criminal statutes."

Important State interests justifying abstention were also present in Juidice v. Vail, 45 U.S.L.W. 4269 (U.S. March 22, 1977). The Court explained those interests as follows:

> **These principles [of comity and federalism] apply to a case in which the State's contempt process is involved. A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest. . . .The contempt power lies at the core of the administration of a State's judicial system, (citation omitted). Whether disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of contempt of court, is labeled civil, quasi-criminal, or criminal in nature, we think the salient fact is that federal court interference with the State's contempt process is "an offence to the State's interest . . . likely to be every bit as great as it would**

be were this a criminal proceeding," Huffman, supra., at 604. Moreover, such interference with the contempt process not only "unduly interferes with the legitimate activities of the State []," Younger, supra., at 44 -- but also "can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.'" Huffman, supra., at 604. 45 U.S.L.W. at 4271-4272.

Thus, Juidice v. Vail, 45 U.S.L.W. 4269 (U.S. March 22, 1977) involved the very process through which the State "vindicates the regular operation of its judicial system." It involved a basic and primary purpose of State government. No such circumstances are present in the instant case. The operation of the State judicial system itself is not affected by this action. Rather, this is a private controversy which involves the State only indirectly and tangentially. The important State interests which justified abstention in Juidice, supra., are not present in the instant case.

Similar important State interests were present in Trainor v. Hernandez, 45 U.S.L.W. 4535 (U.S. May 31, 1977). That case involved a state action brought by the State in its sovereign capacity. The purpose of the suit was "to vindicate important state policies

such as safeguarding the fiscal integrity" of state public assistance programs. 45 U.S.L.W. at 4537. It is important to note also that "State authorities also had the option of vindicating these policies through criminal prosecutions. 45 U.S.L.W. at 4537.

The common thread of Huffman, Juidice and Trainor is readily apparent. In each of these cases, the State itself was a party to the action pending in the state court. In each case, the State had a very real, direct and substantial interest in the outcome of the suit. The case at bar, however, has none of these features. The State is not a party to the action in state court. Nor does the State have any real, direct or substantial interest in the outcome.

The District Court attempted to supply an important State interest by noting that when the Constitution was adopted, it was commonly understood that the matter of domestic relations was reserved to the States. Infra., p. 32. This fact, however, falls short of establishing the type of direct and substantial State interest which was present in the cases discussed above. Although the State's interest in regulating the area of domestic relations may be thought to be an important interest, it is surely far less important that the State's interest in controlling criminal conduct or operating its judicial system.

However, the District Court's characterization of this case as being within the area of domestic relations is a superficial one. The State's interest in, or ability to control the area of domestic relations is not in issue here. This is a private controversy which involves a contract between private parties.

The fact that Richard and Lorraine Spencer were formerly husband and wife did furnish the occasion for the application of the statute in controversy. The statute gave protection and safeguards to contracting wives, while denying that protection to husbands. The crucial question here is one of gender based discrimination and not one of marital rights and relationships. The state statute simply provides that certain contracts between men and women are not valid unless the women involved are given the protection of private examinations. This protection, however, is not available to male persons. The statute is limited in coverage, it is true, to contracts between married persons. However, the constitutional problems would be the same if this limitation were absent. The fact that the statutory classification extends only to married persons has no effect upon the gender based classification. The marital relationship between the parties is merely an incidental circumstance and not an operative fact in the case. Appellant has not challenged the State's authority to

regulate contracts between married persons in a different fashion than it regulates contracts between unmarried persons. Nor has he challenged the State's authority to create duties and rights of support as an incident of the marital relationship. He challenges merely the validity of a contract which would unquestionably be void if he were a female person. The gender based classification of the state statute is challenged here. The right of the State to regulate contracts between married persons is not challenged.

For these reasons, it is clear that the State's interest in this case is not sufficiently important to justify abstention. The case does not involve primary State functions and purposes of the types involved in Huffman, Juidice and Trainor. Considerations of comity and federalism do not, therefore, require abstention in this case.

B. Abstention is inapprcpriate in a case involving a statute which is "flagrantly and patently violative of express constitutional prohibitions."

The District Court, in dismissing the action, relied upon the doctrine of Younger v. Harris, 401 U.S. 37 (1971). The instant case, however, falls within an exception to that doctrine which the United States Supreme Court explained as follows:

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. 401 U.S. at 53-54.

This exception was twice recognized by the Court in Huffman v. Pursue, Ltd., 420 U.S. 592, 602, 611 (1975) and was against recognized in Trainor v. Hernandez, 45 U.S.L.W. 4535, 4538 (U.S. May 31, 1977). The statute in question, N.C. Gen. Stat. § 52-12 (now § 52-6), falls within this exception. The statute is "flagrantly and patently" in violation of the Fourteenth Amendment. Indeed, appellees, in their briefs on the merits before the three-judge court, made no argument to the contrary! Their arguments dealt only with the problem of remedies.

By virtue of N.C. Gen. Stat. § 52-12 (now § 52-6), a private examination of

the wife is a prerequisite to the validity of any contract between spouses. Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967); Bolin v. Bolin, 246 N.C. 666, 99 S.E.2d 920 (1957). Whenever spouses contract with each other, a certifying officer is required to examine the wife, separate and apart from her husband. Based upon this examination, the officer must certify that the wife signed the contract freely and voluntarily, without fear or compulsion of her husband or any other person. He must also find as a fact and certify that the contract is not unreasonable or injurious to her. Unless these requirements are met, the contract is absolutely void. Caldwell v. Blount, 193 N.C. 560, 563, 137 S.E. 578 (1927); Butler v. Butler, 169 N.C. 584, 86 S.E. 807 (1915).

By the terms of the statute itself, it is clear that a husband is not entitled to a private examination. The statute neither requires nor permits a private examination for male persons under any circumstances. N.C. Gen. Stat. § 52-12 (now § 52-6); Kanoy v. Kanoy, 17 N.C. App. 344, 194 S.E.2d 201 (1973).

The statute classifies married persons based upon their gender alone. A married female person always comes within the provisions of the statute, regardless of her intelligence, education or general competency. A married male person, however, never comes within the provisions of the statute and is not entitled to a private examination under

any circumstances. The applicability of the statute depends solely upon the gender of the person involved.

This classification, predicated as it is solely upon the basis of gender, "flagrantly and patently" violates the prohibition of the equal protection clause of the Fourteenth Amendment. It is wholly and completely without justification. In the absence of any rational basis for the classification, the statute cannot be sustained. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973).

The instant case is similar to the case of Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). That case involved discrimination against a widower under the Social Security Act. Under the Act, benefits based on the earnings of a deceased husband and father were payable to the widow and to the minor children in her care. However, benefits based on the earnings of a deceased wife and mother were payable only to the minor children and not to the widower. Said the Court:

> Section 402(g) clearly operates, as did the statutes invalidated by our judgment in Frontiero, to deprive women of protection for their families which men receive as a result of their employment. Indeed, the classification here is in some ways more pernicious. First, it was open to the servicewoman in Frontiero to prove that her husband was in fact dependent

> upon her. Here, Stephen Wiesenfeld was not given the opportunity to show, as may well have been the case, that he was dependent upon his wife for his support. . . 420 U.S. at 644-645.

The Wiesenfeld case is remarkably similar to the case at bar. In both cases, the classifications are even more "pernicious" than the classification in Frontiero. In Frontiero, at least, a servicewoman did have an opportunity to prove that her husband was in fact dependent upon her for his support. In Wiesenfeld, the male plaintiff could not, under any circumstances, qualify for benefits based upon his wife's earnings. In the case at bar, appellant cannot, under any circumstances, qualify for a private examination. The discrimination here is flagrant and unyielding.

The statute assumes that wives require the protection afforded by a private examination. It also assumes that husbands neither need nor should be entitled to the same protection. This assumption is irrebuttable. Such irrebuttable presumptions are disfavored under the Fourteenth Amendment. In Cleveland Board of Education v. Lafleur, 414 U.S. 632 (1974), the Court rejected an irrebuttable presumption that a teacher is physically unable to continue her work after a certain month of pregnancy. The Court stated that:

> [T]he provisions amount to a conclusive presumption that every pregnant teacher who

> reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor -- or the school board's -- as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary. 414 U.S. at 644.

Likewise, in the instant case, the statute assumes that every woman requires the protection of a private examination when contracting with her spouse. It further assumes that men do not require that same protection. There is no individualized determination as to a particular man's mental or emotional condition at the time a separation agreement is executed. The statute contains an irrebuttable presumption that male persons do not require the protection of a private examination. The presumption applies even when the evidence as to an individual man's mental or emotional condition might be wholly to the contrary.

This Court has rejected similar "old notions" concerning differences between the sexes. Stanton v. Stanton, 421 U.S. 7 (1975). The assumptions underlying N.C. Gen. Stat. § 52-12 (now § 52-6) merit the same rejection.

The State legislature might validly conclude that a person contracting with his or her spouse, particularly in the context of a separation agreement, might be under emotional and mental stress and might require the protection afforded by an independent examination of the contract by an officer of the court. However, the legislature may not validly conclude that male persons, simply because they are male, do not require this protection. In this regard, certain language of the plurality opinion in Frontiero v. Richardson, 411 U.S. 677 (1973), is pertinent:

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . ." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statutes (sic) as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. 411 U.S. at 686-687.

In the instant case, the statutory

distinction is based solely upon gender and has no relation to the actual needs or capabilities of the persons involved. The actual purpose of the statute is to afford protection to persons who might be coerced or unduly influenced when contracting with their spouses. It cannot be denied that there are men as well as women who need such protection. The legislature, however, has limited the protection to women. The State has made the very kind of arbitrary distinction which is forbidden by the Fourteenth Amendment.

In a case like this one, where the statute is patently and flagrantly in violation of the Fourteenth Amendment, the federal courts have a duty to exercise their jurisdiction. The principles of Younger v. Harris, supra., do not apply in such a case and abstention is improper.

CONCLUSION

Appellant respectfully submits that the District Court erred in failing to hear and determine the issues presented. Abstention is improper unless the case involves sufficiently important State interests. The State interests involved here are minimal and cannot justify abstention. Furthermore, the statute involved here is one which is "flagrantly and patently" in violation of the Fourteenth Amendment. In such a case,. abstention is improper.

Respectfully submitted,

Janet L. Covey
Counsel for Appellant
Sherwood House Law Building
426 West Friendly Avenue
Greensboro, N.C. 27401
(919) 273-8276

OPINION OF THE COURT

GORDON, Chief Judge

This three-judge court was convened to consider the claims of Richard E. Spencer that his constitutional rights were violated by the implementation of the North Carolina privy examination statute. The plaintiff contends that he was denied the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution inasmuch as the privy examination statute provided his wife with a private examination by a judicial officer to determine that the separation agreement entered into between the plaintiff and his wife was not unreasonable or injurious to the wife while, at the same time, the statute denied the plaintiff the same detached determination by a judicial officer as to the reasonableness of the separation agreement as it pertained to him.

On April 5, 1976, the plaintiff instituted this action, with a request that it be maintained as a class action, seeking injunctive and declaratory relief from the enforcement of N.C. Gen. Stat. § 52-6; that the Court declare the rights of the parties to the separation agreement, and further, that the court restrain the enforcement of the separation agreement against the plaintiff. Additionally, the plaintiff demanded that the court declare the separation agreement void or, in the alternative, require that he be given a privy examination prior to the

enforcement of the separation agreement.

The plaintiff is an adult male who was married to the defendant Lorraine Spencer on September 12, 1942. Thereafter, the plaintiff and the defendant lived together as husband and wife until August of 1959, at which time they separated. On June 7, 1960, the plaintiff and the defendant Lorraine Spencer entered into a separation agreement which was executed in compliance with the provisions of N.C. Gen. Stat. § 52-6.

In accordance with the provisions of the statute, the defendant Lorraine Spencer was given a privy examination at the time the separation agreement was executed. An Assistant Clerk of the Superior Court of Guilford County, North Carolina, privately examined the plaintiff's wife concerning the execution of the separation agreement. The Assistant Clerk certified that the defendant stated that she signed the agreement freely and voluntarily, without fear and compulsion of her husband or any other person. The Clerk then certified that the agreement was not unreasonable or injurious to her.

No privy examination was given to the plaintiff Richard Spencer in connection with the execution of the separation agreement, and there was no certification by any officer of the court that such agreement was not unreasonable or injurious to him. The statute did not make provision for such an examination of the husband, nor were there any other statutory provisions requiring or

permitting a privy examination for male persons.

The defendant Lorraine Spencer has on occasions threatened action in the State Courts of North Carolina presided over by the defendant Judges for enforcement of the provisions of the separation agreement executed without a privy examination for the plaintiff. Furthermore, the predecessors of the defendant Judges have, acting under color of state law, enforced the separation agreement against the plaintiff. Specifically, on May 25, 1962, judgment was rendered against the plaintiff in the Municipal County Court in the amount of $700.00, which sum represented the arrears in payments under the separation agreement as of that time.

This cause was originally set for oral argument on January 31, 1977. Fourteen days prior to the time of the original hearing date, the defendant Lorraine Spencer filed a motion to dismiss or stay this action upon the grounds announced in Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971). In this motion certain facts were first brought to the Court's attention which could have eliminated the necessity for much of the work already performed by the parties and the Court. In her motion, Lorraine Spencer set forth facts indicating that on April 6, 1976, the day following the commencement of this action, she filed an action against the plaintiff in the District Court Division of the Guilford

County General Court of Justice. The allegations of the complaint in that action are identical to the allegations of the counterclaim in the case at bar; and the allegations of the counterclaim in the State case are virtually identical to the allegations of the complaint in this action.

From these facts the defendant Lorraine Spencer contends that she is entitled to a dismissal of this action on the relevant principles of equity, comity, and federalism enunciated in Younger.

A resolution of the serious constitutional questions presented in this case are unnecessary if this Court concludes that it would be inappropriate to hear and determine this matter. The pendency of a similar action in the state courts of North Carolina requires a resolution of the conflicting principles of equity, comity, and federalism with the maintenance of this federal action.

Since the beginning of this country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try cases free from interference by federal courts. The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that

courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. Younger, supra at 43. In addition, general notions of comity, equity and federalism support the public policy against federal interference with state proceedings. This policy arises out of the courts' manifest desire to permit state courts to try cases free from interference by the federal courts.

These general notions of equity, comity and federalism, applied since the early days of our union of States and most recently in Younger, occupy a highly important place in our history and future. Their application should never be made to turn on such labels as "civil" or "criminal." Consequently, these principles apply equally to both civil and criminal actions pending in state courts. Juidice v. Vail, 20 Crim. L.R. 3077 (U.S. March 22, 1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975); Lynch v. Snepp, 472 F.2d 769, 773 (4th Cir. 1973).

It goes without saying that the principles of equity, comity and federalism have little force in the absence of a pending state proceeding. Steffel v. Thompson, 415 U.S. 452, 39 L.Ed.2d 505, 94 S.Ct. 1209 (1974). The seriousness of federal interference with state civil functions, particularly where the party to the federal case may fully litigate his claim before the state court,

mandates that this Court not trivialize the principles of equity, comity and federalism by a strict adherence to the requirement that there must have been a pending state action prior to the date of the filing of the federal action. Therefore, where state proceedings are begun against the federal plaintiff after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of Younger and Huffman should apply with full force. Hicks v. Miranda, 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281 (1975).

The principles enunciated above mandate that this Court should stay its hand in the resolution of this matter. Clearly, the state action was filed prior to the time any proceedings of substance had taken place in this Court inasmuch as the state action was filed just one day after the filing of this action. Moreover, it is also clear that the state action has been calendared for trial on several different occasions only to be continued at the insistence of the federal plaintiff. Therefore, there can be no question that the plaintiff will have a full and prompt hearing on the merits of his claim in the state courts.

In keeping with the letter and spirit of the Younger and Huffman decisions, this Court should not deny the courts of North Carolina the right to pass on the constitutionality of the statute. Moreover, even after this matter has

been fully litigated in the state courts, the plaintiff will still have certain recourse for appeal within the federal system. 28 U.S.C. § 1257(2).

In addition to the reasons previously stated, the Court concludes that the plaintiff has failed to establish even a minimal showing that he will suffer immediate and irreparable harm sufficient to justify this Court interfering with a pending state proceeding. Moreover, the Court can perceive of no harm that will befall the plaintiff from pursuing his claims in the state courts. To allow this case to continue in this forum would result in the maintenance of two lawsuits involving the same parties, the same subject matter, and the duplication of much time and energy on the part of the Courts. Therefore, in order to avoid a useless conflict between this Court and the state court addressing the very same issues as presented in this action, the Court concludes that the only appropriate action which can be taken at this time is the prompt dismissal of the plaintiff's action.

The Court denies the plaintiff's request for class action status in the maintenance of this suit. This ruling will in no way effect the rights of the other members of the purported class the plaintiff seeks to represent.

During the course of oral argument counsel for the state defendants called the Court's attention to N.C. Gen. Stat.

§ 52-8.[2] At that time counsel and the Court observed that this statute might render the plaintiff's federal claims moot. Section 52-8, N.C. Gen. Stat., on its face, appears to validate all agreements entered into between January 1, 1931, and December 31, 1974, which were not executed in accordance with the provisions of N.C. Gen. Stat. § 52-8.

In view of the Court's prior holding that this matter should proceed in the state courts rather than in this forum, the Court will not launch into an extended exposition on this statute's effect upon this controversy. However, in light of the defendants' position that this statute moots the present controversy, the Court feels obliged to comment upon the state defendants' position concerning this statute.

---

[2]N.C. Gen. Stat. § 52-8. Validation of contracts between husband and wife where wife is not privately examined. --Any contract between husband and wife coming within the provisions of G.S. 52-6 executed between January 1, 1930 and December 31, 1974, which does not comply with the requirement of a private examination of the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. This section shall not affect pending litigation.

It is the defendants' contention that, inasmuch as the statute purports to deprive the plaintiff's wife of the opportunity to have the agreement declared void on the grounds of non-compliance with the statute, that it would follow that the plaintiff cannot have the agreement voided, because to allow such a result would impose upon the plaintiff greater rights under the statute than were conferred upon the wife as a result of the operation of the statute. Accordingly, so the defendants' argument goes, any defect in the separation agreement arising out of the operation of the privy examination statute has been cured by this particular piece of legislation.

The Court has examined the statute and the cases dealing with its application. The statute, by its express terms, deals only with contracts between a husband and wife which are "in all other respects regular." The only case law in North Carolina bearing upon the interpretation given to the above-quoted language appears in Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849, 856 (1970), and Boone v. Brown, 11 N.C. App. 355, 181 S.E.2d 157, 159 (1971).

Boone involved a special proceeding to sell a house and lot on petition for partition. In Boone the wife's deed was not acknowledged in accordance with the provisions of N.C. Gen. Stat. § 52-6. No private examination of the wife was made as required by G.S. § 52-6(a);

the certifying officer did not incorporate in her certificate a statement of her conclusions and findings of fact as to whether or not the deed was unreasonable or injurious to the wife as required by G.S. § 52-6(b); and the certifying official who took the wife's acknowledgement was a notary public and as such was not one of the officials authorized by G.S. § 52-6(c) to make the required certificate. The court held that G.S. § 52-8 was not applicable to this case. The court stated that, ". . . unless the requirements of the statute are complied with, such deed is void." Boone, supra at 158.

The Court in Boone commented that N.C. Gen. Stat. § 52-8 applies to only those contracts which are in all other respects regular. The failure of the wife to be privately examined and for the certifying officer to make appropriate findings of fact rendered the contract outside the language of the statute as being "in all other respects regular." Accordingly, the court determined that the defect in the wife's acknowledgement was not cured by N.C. Gen. Stat. § 52-8.

In Mansour the North Carolina Supreme Court placed a similar construction upon the statutory language "in all other respects regular." The court stated that the failure of the certifying officer to make findings of fact concerning the agreement took the contract out of the provisions of the curative statute. Additionally, the court noted that N.C. Gen. Stat. § 52-8

had been enacted subsequent to the execution of the contract and the vesting of rights thereunder. Commenting on the effect of the curative statute on a fully executed contract the court observed, "[A] void contract cannot be validated by a subsequent act, and the legislature has no power to pass acts affecting vested rights." Mansour, supra at 857.

Accordingly, the Court observes that N.C. Gen. Stat. § 52-8 and cases decided thereunder do not appear to support the argument the defendants press upon this court.

By way of summary, we hold that the pendency of an action in state court involving these same parties and issues present in this action precludes this Court from exercising its jurisdiction to determine the plaintiff's federal claims presented in his complaint.[3]

---

[3]When the Constitution was adopted, the common understanding was that the domestic relations of husband and wife were matters reserved to the States. Popovici v. Agler, 280 U.S. 379, 383 (1930); Ex parte Burrus, 136 U.S. 586, 593, 594 (1890); Simms v. Simms, 175 U.S. 162, 167 (1899). Although this proposition does not control the disposition of suits involving substantial federal questions, it does serve to focus the Court's attention on the propriety of allowing state courts an opportunity to rule on the consti-

We hold on the facts of the case that this Court should abstain from hearing this cause. We request that counsel for the defendants prepare and submit to counsel for plaintiff an appropriate judgment to be submitted thereafter to the Court.

---

tutionality of legislation governing the relations between married persons residing within the State.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
No. C-76-163-G

RICHARD E. SPENCER, Plaintiff,	)	
v.	)	JUDGMENT
LORRAINE SPENCER, et. al., Defendants.	)	

In conformance with the opinion of the court filed on April 29, 1977, it is,

ORDERED, ADJUDGED, AND DECREED, that plaintiff's motion to proceed as a class action be and the same is hereby denied; the motion of defendant Lorraine Spencer to dismiss this action on the ground of the pendency of an action in the North Carolina state courts in which the claims presented here will be fully litigated, is allowed, and this action be and hereby is dismissed and plaintiff is taxed with the costs of this action.

This 19th day of May, 1977.

s/Eugene A. Gordon
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
No. C-76-163-G

RICHARD E. SPENCER, Plaintiff,	)	
vs.	)	NOTICE OF APPEAL
LORRAINE SPENCER, et al., Defendants.	)	

NOTICE is hereby given that Richard E. Spencer, plaintiff above named, hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S. C. § 1253, from the final judgment entered in this action on the 19th day of May, 1977.

This 15th day of June, 1977.

s/ Janet L. Covey
Attorney for Plaintiff
Sherwood House Law Bldg.
426 W. Friendly Avenue
Greensboro, N.C. 27401
(919(273-8276

CERTIFICATE OF SERVICE

I, Janet L. Covey, hereby certify that I have this day served copies of the foregoing Jurisdictional Statement upon the Defendants-Appellees in this action by depositing said copies in a United States post office, with first class postage pre-paid, addressed to counsel of record for the defendants at their respective post office addresses as follows:

Ms. Ann Reed, Esq.
Office of the Attorney General
Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

Mr. Norman B. Smith, Esq.
Smith, Patterson, Follin,
Curtis & James
Attorneys at Law
704 Southeastern Building
Greensboro, North Carolina 27401

This 10th day of August, 1977.

Janet L. Covey
Counsel for Appellant